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Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 950.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

A. J. TOWER COMPANY.

BRIEF FOR RESPONDENT, A. J. TOWER COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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(1) The petition does not present an important question of Federal law heretofore undecided by the Supreme Court or one important to the administration of the National Labor Relations Act.

The petitioner's assumption that the Board has power to make any regulations that *are not arbitrary* (Petr.'s Brief, p. 14) is repugnant to the provision of Section 6 of the Act—"as may be necessary to carry out the provisions of this Act" (Petr.'s Brief, Appendix, p. 27). The further assumption that the Board has power to give "finality," *i.e.*, non-reviewability, to election results administratively determined is not consistent with the provisions of Section 9(d) of the Act. This subsection, omitted from petitioner's tabulation of pertinent provisions of the National La-

bor Relations Act (Petr.'s Brief, Appendix, pp. 27-29), reads as follows:

> "(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

The petitioner's contention that it can give its proceedings in representation cases immunity from judicial review lacks substance.

According to petitioner post-election challenges based on ineligibility arose in the following consent elections: *Matter of Kellogg Switchboard & Supply Co.*, 28 N.L.R.B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N.L.R.B. 156 (Petr.'s Brief, p. 18, note 3). In the former case it appeared that objections were considered on their merits and

> ". . . if all the votes directly challenged in the objections were to be counted for the Independent, the majority obtained by the Unions would remain unimpaired." (28 N.L.R.B. at p. 852.)

In the *Capitol Greyhound Lines* case the court said:

> "The Regional Director, in overruling the post-election objection to Nolan's voting, had emphasized

the facts that Nolan was admittedly within the Unit and in the employ of respondent at the time of the election; . . ." (140 F. (2d) 754, 757.)

The instant case stands as the only consent-election case in which the employer made the objection, under Section 7 of the Standard Consent Election Agreement (Record, p. 105, note) that a non-employee had voted, and where, as pointed out by the court below, both the Regional Director and the Board declined to make a finding on the issue of status thus raised (Record, pp. 103, 104). Since the Act has been in operation there have been 16,436 consent elections (Petr.'s Brief, p. 17, note 2). The Act was approved July 5, 1935.

Further, the Government states the issue too sweepingly. It ignores the fact that the objection passed on in this case was filed by respondent within the time allowed under Section 7 of the Consent Election Agreement, entitled "Objections;—challenges, reports thereon," which provided that objections to the conduct of the ballot or to a *determination of representatives based thereon* may be filed with the Regional Director within five days after the issuance of the tally of ballots (Record, pp. 20, 58, 70; emphasis supplied). The question in the present case does not relate to "post-election challenges" generally, but relates solely to a timely post-election objection filed within the five days permitted under the Board's standard form of Consent Election Agreement, where such objection is that a non-employee has participated in an election although the Act contemplates a "secret ballot of employees" (Section 9 (c)), and his vote may have affected the result. If the lower court's requirement that such timely objections be passed upon interferes with the administration of the Act, the remedy is for the Board to eliminate from its Con-

sent Election Agreement form the clause providing that objections to the conduct of a ballot or to a *determination of representatives based thereon* may be filed within five days *after* the election. The Board does not need a decision of the Supreme Court to accomplish this.

(2) The decision of the Circuit Court of Appeals for the Sixth Circuit in *N.L.R.B.* v. *Capitol Greyhound Lines*, 140 F. (2d) 754, certiorari denied, 322 U.S. 763, is not in conflict with the decision of the court below.

"Decision" and "opinion" are not equivalent terms.

> "The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. . . . The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree'." *Rogers* v. *Hill*, 289 U.S. 582, 587.

In the *Greyhound* case the direction for an election provided that the employees eligible to vote should be those on the Company's payroll during the payroll period ending July 31, 1942. The election was to be held on September 2, 1942. The Company was requested to make up a list of eligible employees and the clerk assigned to this duty made up a list from the payroll of August 15th on the assumption that it was the same as the payroll of July 31st (49 N.L.R.B. 156, 158). As a matter of fact, between the two dates one new employee (Nolan) had been hired. Nolan voted at the election without challenge. The employer discovered the mistake and objected to the certification of the Union. The Board refused to set the election aside and subsequently, in an unfair labor practice proceeding for failure to recognize the Union, made an order against the Company. The Circuit Court of Appeals for the Sixth

Circuit enforced the order. It is clear that the *Greyhound* election was decided by *employees,* and by a majority of employees. The Board had discretion as to what payroll date should be used, and all it did was to ratify the use of the payroll list of August 15th, a date nearer the election than that originally selected. It could have ordered the use of the August 15th list in the beginning. The result was that the Union was chosen by a majority of the employees who voted and who were employees at the time of the election. The decision in no wise supports the view that the Board, by invoking "waiver" or "estoppel," may permit elections to be decided by non-employees. In the instant case the very point raised by the respondent's objections filed with the Regional Director was that Mrs. Kane was not an employee at the time of the election, and this issue was never decided, either by the Regional Director or by the Board. In the instant case the court below said,

> ". . . Since Nolan was admittedly an employee on the date of the election, it cannot be said that the Board was without jurisdiction to certify the Union as the bargaining agent of the employees. The statute gives the Board discretion to use any reasonable method it deems wise to determine whether a Union represents a majority of employees. Had the employer contested the fact of Nolan's employment as of the election and had the Board made no finding on that issue, the result in the *Capitol Greyhound* case might well have been different. . . ." (Record, p. 108).

Since the *Capitol Greyhound* case did not involve the issue decided by the court in the instant case, there is no conflict.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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